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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM T. ELLIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

REX E. LEE *
CARTER G. PHILLIPS
LAURA V. FARTHING
KURT H. JACOBS
JEANNE BOWMAN SZROMBA
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ROBERT M. BASTRESS, JR.
FRANKLIN D. CLECKLEY
West Virginia University
Law Center
University Avenue
Morgantown, WV 26506
(304) 293-5308

Counsel for Petitioner

* Counsel of Record

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In the petition for certiorari, petitioner described the clear conflict which exists between the Fourth Circuit's holding that a statement made pursuant to a plea agreement supports finding a particularized guarantee of trustworthiness and the holdings of other federal circuits that the existence of a plea agreement is an indicator of *un*-trustworthiness. Pet. 16-20. The response submitted by the United States confirms the severity of this conflict. The government does not cite a single opinion, other than the one for which review is sought, that holds that a statement made pursuant to a plea agreement enhances trustworthiness. Instead, the United States attempts to downplay the severity of the conflict between the Fourth Circuit and other courts by focusing on trivial distinctions between the circuits' opinions. Opp. 6-7. The United States also repeats the trustworthiness factors listed by

the Fourth Circuit, but adds little to explain how those factors rendered declarant's statement particularly trustworthy, and makes virtually no effort to respond to petitioner's arguments that these factors were wholly inadequate to support admission of the statement.

This case presents a perfect vehicle in which to resolve the decisional conflict created in the wake of *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), because the district court itself acknowledged the critical nature of D'Annunzio's testimony. Without it, there was nothing to link the money petitioner appeared to pay for lobbying services to an illegal attempt to influence legislation. The United States does not challenge that finding; nor could it. Thus, the issue presented here is vital to the proper disposition of petitioner's conviction. The United States' three-and-a-half page effort to brush the issue aside warrants a reply.

1. The United States attempts to downplay the conflict between the Fourth Circuit and other courts by arguing that "none of the decisions on which petitioner relies holds that the existence of a plea agreement can *never* be used to support the reliability of a hearsay statement." Opp. 6 (emphasis added). But this response simply ignores the issue. Those courts have firmly held that the existence of a plea agreement gives a declarant a *motive* to fabricate the truth, and hence is an indicator of untrustworthiness. *United States* v. *Gomez-Lemos*, 939 F.2d 326, 333 (6th Cir. 1991); *United States* v. *Feldman*, 761 F.2d 380, 387-88 (7th Cir. 1985); *United States* v. *Bailey*, 581 F.2d 341, 350 (3d Cir. 1978); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977); *United States* v. *Turner*, 475 F. Supp. 194, 198 (E.D. Mich. 1978); see *United States* v. *Love*, 592 F.2d 1022, 1027 (8th Cir. 1979) (statement given to police while declarant believed she was subject to prosecution inadmissible under Rule 804(b)(5) and "raises a serious confrontation clause issue"). In stark contrast, the court

of appeals here relied almost exclusively on the plea agreement to support trustworthiness.[1]

2. The government argues that the decision is correct because here the declarant, D'Annunzio, "knew that the truthfulness of his statements would be tested in the course of the government's investigation, and that any false statements could subject him to prosecution and imprisonment." Opp. 7. First, this does not eliminate the conflict in the circuits. In cases relied upon by petitioner, the declarants also had grounds to believe that their statements would be subject to further testing and investigation. See, e.g., *Gomez-Lemos*, 939 F.2d at 328 (declarant testified before grand jury pursuant to plea agreement but refused to testify at trial); *Bailey*, 581 F.2d at 343 ("terms of the agreement required [declarant] . . . to testify at any future proceedings concerning the robbery"); *Turner*, 475 F. Supp. at 198 (declarant gave signed statement as part of ongoing drug investigation and agreed "to testify before the Grand Jury"). Moreover, the awareness that their statements would be subject to further investigation would apply to virtually all declarants giving statements pursuant to plea agree-

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[1] The government's charge that *United States* v. *Bailey* is distinguishable because it was ultimately decided on non-constitutional grounds, Opp. 7, raises another distinction without a difference. In *Bailey* the court avoided deciding the case on constitutional grounds by holding that statements made pursuant to a plea agreement did not possess "guarantees of trustworthiness equivalent to the other Rule 804(b) exceptions that serve as a benchmark for Rule 804(b)(5)" and hence were improperly admitted under the catch-all provisions of Rule 804(b)(5). 581 F.2d at 350. Bailey's holding that a statement made pursuant to a plea agreement lacked "guarantees of trustworthiness equivalent to other Rule 804(b) exceptions" is directly relevant to the core issue presented by the Fourth Circuit's analysis.

Moreover, the government's argument misses the primary point that declarant's statement was not admissible and, if it had been offered in other courts, would not have been admitted. Obviously, this Court still could choose not to reach the constitutional issue, and could decide the case based on the federal rule.

ments. See Pet. 14; Opp. 7 n.2. The purpose of government investigators in taking a co-conspirator's statement under a plea agreement usually is to further an investigation.

Furthermore, the United States notes that "[t]he government was pursuing an active investigation that included secret tape recordings of other participants in the scheme," Opp. 7 n.2, and then adds "[a]t the very least, there was a reasonable probability that other participants would cooperate with the government." *Id.* But nothing is cited to show that D'Annunzio was aware of the nature of the government's investigation when he gave his statements in January 1988.

Moreover, the government's contention that fear of detection will outweigh any motivation to shade the truth that a declarant giving statements under a plea agreement may have should not be the basis of holding that such statements possess the "particularized guarantees of trustworthiness" required by the Confrontation Clause. This Court has emphasized that the totality of the circumstances should indicate that a declarant lacks motivation to lie:

> We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.

Idaho, 110 S. Ct. at 3149. The fact that a declarant may have some understanding that portions of his statement given under a plea agreement may be investigated "provide[s] no basis for supposing that the declarant is particularly likely to be telling the truth." *Id.* at 3150. Only cross-examination, especially about a subject that was known only by the declarant and petitioner, can adequately serve to test the trustworthiness of that kind of statement. See *Lee* v. *Illinois*, 476 U.S. 530, 541

(1986) ("the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination"); *Bruton* v. *United States*, 391 U.S. 123, 136 (1968) (accusations of co-conspirator are "inevitably suspect"); *Douglas* v. *Alabama*, 380 U.S. 415, 420 (1965) (cross-examination of government agent "could not substitute for cross-examination of [defendant's accomplice] to test the truth of the statement itself").[2]

The remainder of the government's response consists of relisting the trustworthiness factors relied upon by the Fourth Circuit. As indicated in the petition, these factors largely reduce to the single fact that D'Annunzio's statement was given pursuant to a plea agreement. No effort is made by the government to respond to any of petitioner's specific arguments concerning these "factors".[3] The reason for that silence is patent; the govern-

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[2] The problem of "selective reliability" and verification are particularly acute in this case. The declarant allegedly told investigating agents that petitioner approached him and said "Can you go to someone? I've got as high as $20,000 to get the bill moving." No other evidence produced at trial indicated that petitioner made this statement or understood that D'Annunzio would bribe officials. As the alleged conversation occurred only between D'Annunzio and petitioner, D'Annunzio's statement could not be verified or disproved. Hence, D'Annunzio might have had little fear of detection in making his statement.

[3] The government does state, in a footnote, that D'Annunzio's subsequent decision to wear a wire does not constitute "corroborative evidence that the events described in [D'Annunzio's] statements actually occurred." Opp. 6 n.1. The fallacy of the government's position is that D'Annunzio's decision to wear a wire, standing alone, proves little about his earlier trustworthiness in making his statements. The worth of D'Annunzio's subsequent action depends upon whether D'Annunzio actually met with the petitioner and discussed petitioner's alleged intention that D'Annunzio bribe legislators. The government is arguing, contrary to *Idaho* v. *Wright*, that subsequent taped conversations may be used as corroborative evidence to "bootstrap" the trustworthiness of prior statements. In the present case, such use of D'Annunzio's two, brief taped conversations with

ment cannot defend this inherently unreliable but absolutely vital evidence.

3. The government's attempt to paper over the conflict between the course taken by the Fourth Circuit and that of other Circuits with respect to the trustworthiness of statements given pursuant to a plea agreement should be rejected, and the Fourth Circuit brought in line with other circuits. The spectre of petitioner serving more than seven years in prison based solely on a hearsay statement made during plea negotiations by an individual who committed suicide while the government's investigation was ongoing simply cannot satisfy the requirement of trustworthiness. Because the court of appeals' assessment of that issue departs fundamentally from the conventional wisdom followed by most other courts, review by this Court is warranted.

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petitioner is particularly egregious, for in neither of the conversations did D'Annunzio state to petitioner that petitioner had given money to D'Annunzio to be used to bribe legislators. Moreover, the taped conversations themselves were admitted and their evidentiary value weighed directly by the jury.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

REX E. LEE *
CARTER G. PHILLIPS
LAURA V. FARTHING
KURT H. JACOBS
JEANNE BOWMAN SZROMBA
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ROBERT M. BASTRESS, JR.
FRANKLIN D. CLECKLEY
West Virginia University
Law Center
University Avenue
Morgantown, WV 26506
(304) 293-5308

Counsel for Petitioner

* Counsel of Record

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